

No.490800-6

IN THE COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

GARY W. BOGLE , Appellant

APPEAL FROM THE SUPERIOR COURT
OF THURSTON COUNTY
THE HONORABLE JUDGE KALO WILCOX

SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	ASSIGNMENT OF ERROR.....	1
II.	STATEMENT OF FACTS.....	1
III.	ARGUMENT.....	1
	Mr. Bogle Received Ineffective Assistance of Counsel Requiring Remand For Resentencing.	1
IV.	CONCLUSION.....	6

TABLE OF AUTHORITIES

Washington State Cases

<i>State v. Calvert</i> , 79 Wn.App. 569, 903 P.2d 1003 (1995)	4
<i>State v. Dunaway</i> , 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987)	3
<i>State v. Haddock</i> , 141 Wn.2d 103, 3P.3d 733 (2000)	1
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991)	4
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	5
<i>State v. Porter</i> , 133 Wn.2d 177, 942 P.2d 974 (1997)	4
<i>State v. Saunders</i> , 120 Wn.App. 800, 86 P.3d 232 (2004)	5
<i>State v. Torngren</i> , 147 Wn.App. 556, 196 P.3d 742 (2008)	2
<i>State v. Vike</i> , 125 Wn.2d 407, 885 P.2d 824 (1994)	2

Federal Cases

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	5
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Statutes

RCW 9.94A.510	5
RCW 9.94A.525(5)(a)(i)	2
RCW 9.94A.589(1)(a)	1

I. ASSIGNMENTS OF ERROR

A. Mr. Bogle received ineffective assistance of counsel at sentencing.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did Mr. Bogle receive ineffective assistance of counsel where counsel did not raise or argue “same criminal conduct” at sentencing?

II. STATEMENT OF FACTS

Mr. Bogle relies on the facts presented in his opening brief, and incorporates them by reference. Without conceding any argument from the opening brief, Mr. Bogle adds the following argument.

III. ARGUMENT

Mr. Bogle Received Ineffective Assistance of Counsel Requiring Remand For Resentencing.

If two current offenses encompass the same criminal conduct, those offenses will only count as one point in calculating an offender’s score. *State v. Haddock*, 141 Wn.2d 103, 108, 3P.3d 733 (2000); RCW 9.94A.589(1)(a). Prior adult convictions should

be counted as criminal history unless they were not previously deemed 'same criminal conduct' but their sentences were served concurrently and the court now determines that they were committed at the same time, in the same place, and involved the same victim.¹

If the prior sentencing court did not make a same criminal conduct finding, but nonetheless ordered the offender to serve the sentences concurrently, the **current** sentencing court must ***independently evaluate*** whether the prior convictions “encompass the same criminal conduct” and, if they do, must count them as one offense. RCW 9.94A.525(5)(a)(i); *State v. Torngren*, 147 Wn.App. 556, 563, 196 P.3d 742 (2008).

“Same criminal conduct” is defined by statute and case law as “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a); *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

Whether offenses involve the same criminal intent depends on “the extent to which the criminal intent, as objectively viewed,

¹ 2016 Washington State Adult Sentencing Guidelines Manual, p. 17

changed from one crime to the next.” *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). Here, the California prosecutor charged, and Mr. Bogle was convicted for, ten counts of one crime. The intent was identical.

Here, it can be inferred that the crimes were against the same victim in the California convictions as there was reference to only one victim.²

The one handwritten document submitted by the State for the California convictions lists a single date, 5/14/15³. CP 46.

The ten counts were the same crime, a single violation date is listed, a single victim, and the sentences for the crimes appear to have been served concurrently. The California convictions met the requisite criteria for the Washington Court to find they were the same criminal conduct. The trial court here should have independently evaluated whether the prior California convictions encompassed the same criminal conduct and the offender score should have been adjusted to a “1”.

² In a letter to the court, prior to his plea, Mr. Bogle submitted a paper from the California Superior Court. CP 12-14. The paper indicates “Ronnie Glenn Bogle makes a statement to the court.” This is the same victim as the Washington charges.

³ In the same letter found in CP 12-14, the California document lists only one date, 2/21/14, as the violation date.

Similarly, the Washington convictions should be considered the same criminal conduct. They encompassed the same crime, same intent, and same victim.

Additionally, two or more crimes encompass the same criminal conduct where there is a “repeated commission of the same crime against the same victim over a short period of time.” *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997)(citing to 13 Seth Aaron Fine, *Washington Practice* § 2810 at 112 (sup. 1996).

Here, the charged dates of the Washington crimes were April 19, 2015, May 16, 2015, September 17, 2015, October 30, 2015, and November 7, 2015, CP 49-50. The same crimes were repeated over a relatively short period of time, against the same victim. Simultaneity is not required. *State v. Calvert*, 79 Wn.App. 569, 903 P.2d 1003 (1995)(*rev. denied* 129 Wn.2d 1005, 914 P.2d 65 (1996). Mr. Bogle met the standard for consideration of the Washington convictions under the same criminal conduct offender score analysis.

The Courts hold a strong presumption that counsel is competent and provided proper advice and assistance. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Here, however,

counsel's actions are not tied to a legitimate strategic or tactical rationale, and fall below an objective standard of performance. This deficient performance caused prejudice to Mr. Bogle. The court imposed a sentence of 84 months, based on an offender score of 14. CP 61. If Mr. Bogle had been sentenced with the proper offender score of "2", he would be eligible for a standard range sentence of 12+ to 14 months. RCW 9.94A.510.

Counsel's performance was deficient and Mr. Bogle was thereby prejudiced. Mr. Bogle received ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Counsel's failure to argue same criminal conduct constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where counsel can make a same criminal conduct argument and the court can conduct the required independent analysis. *State v. Saunders*, 120 Wn.App. 800, 86 P.3d 232 (2004).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Bogle respectfully asks this Court to find he received ineffective assistance of counsel and remand this matter to the trial court with instructions to consider same criminal conduct in computing a correct offender score.

Respectfully submitted this 3rd day of July 2017.

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Gary W. Bogle, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the supplemental brief of appellant was sent by first class mail, postage prepaid, on July 3, 2017 to:

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